No. 10580

In the United States Circuit Court of Appeals

For the Ninth Circuit

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,

Appellant,

vs.

EDWARD J. JASPER, Administrator of the Estate of Emmett C. Jasper, deceased; ALBERT BROWN and CHARLES M. DAKE,

Appellees.

Brief of Appellant

Appeal from the District Court of the United States for the District of Oregon

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JURISDICTIONAL STATEMENT

It is believed this Court on appeal has jurisdiction for the reason the appeal is from a final judgment entered in the District Court (28 U.S.C.A., Sec. 225). The District Court acquired jurisdiction through service of summons and complaint upon all defendants herein after the filing thereof by appellant seeking a

declaratory judgment (Sec. 28, U.S.C.A., Sec. 400) and alleging facts showing the existence of an actual controversy between the parties (28 U.S.C.A., 71), and showing the further fact that the amount in controversy exceeds the sum of Three Thousand Dollars ($3,000.00). It is an admitted fact that at the time of the commencement of the within action plaintiff was a resident and citizen of the State of Connecticut (T. 2, 8), and that all defendants were residents and citizens of the State of Oregon (T. 2, 8).

STATEMENT OF CASE

This is an action for declaratory judgment. Plaintiff is an insurance company. It issued to one Harold E. Wells a policy of automobile liability insurance. The policy contains what is generally known as an "omnibus" provision (T. 64). This provision extends insurance coverage, in addition to the named insured, to any person while using the automobile "provided the actual use of the automobile is with the permission of the named insured." The controversy here is whether the "actual use" of the pick-up truck owned by the insured Wells and being driven by Charles M. Dake when an accident occurred, was with the permission of Wells. On Sunday night, June 28, 1942, at about 11:00 o'clock, Dake, while driving the Wells

truck, was involved in a collision on the Wolf Creek Highway, some 35 miles west of Forest Grove, Oregon. The collision resulted in the death of Emmett C. Jasper. One of the appellees here is the Administrator of his estate. There were several others in the Jasper car who were allegedly injured. All these persons asserted claims against Wells as the owner of said truck and against the plaintiff here as the insurance carrier for Wells, whereupon plaintiff filed its complaint asking the court below for a declaratory judgment seeking to establish the fact that the "actual use" of the truck by Dake at the time of the accident was not with permission of the named insured. The evidence shows that Wells is engaged in logging operations, operating with a crew of seven or eight men, in a sparsely settled area. Roughly speaking, the place is located between Portland and the Coast, slightly more than half-way from Portland to the Coast. There is one road out of Portland to the Coast known as the Wolf Creek Highway. This road leads toward Seaside, Oregon. There is a road known as the Wilson River Highway, which makes a junction with the Wolf Creek Highway near the town of Timber. About 12 miles southeast of Timber on the Wilson River Highway is the town of Gales Creek. Six miles west of Gales Creek is a place called Glenwood. To the

west of Glenwood, on the Wilson River Highway a distance of six miles, there is a logging road which leads up on Round Top Mountain. Three miles up this logging road is the site of Wells' logging operations. The pick-up truck was used in the logging operations up in the mountains. It had wheels which are several inches higher than ordinary wheels and this facilitated traveling in the rough area. It was not practicable to use an ordinary automobile around the operations. There was no cookhouse or bunkhouse at the logging operations. Wells stayed at the town of Glenwood, most of the other members of his crew stayed at the town of Gales Creek, where they boarded with a family by the name of Adkins. The truck was used to transport the crew to their place of work in the morning and to carry them to Gales Creek in the evening. The usual practice was for Wells to drive the truck in the evening from the site of the operations to Glenwood. He would get out there and some other member of the crew would drive the car to Gales Creek, where it was parked for the night at the Adkins home. In the morning, some member of the crew would drive the car from Gales Creek to Glenwood and Wells would drive it from there to the site of the operations. Wells had a well known rule that no one could use the truck without his permission and

the evidence discloses that Wells at no time ever permitted any member of his crew to use the truck for any personal pleasure trip.

The crew, in their logging operations, worked five days a week, from Monday morning until Friday evening. They did not work on Saturday or Sunday. Dake, on Sunday, June 28, 1942, took the truck, without permission from Wells, started west from Gales Creek on the Wilson River Highway, proceeded a distance of a mile and a half or so and picked up three hitch-hikers, two women and one man. They drove a few miles and stopped and had three or four drinks of liquor, which was furnished by the hitch-hikers. The hitch-hikers were on their way to Tillamook, a distance of some forty miles. Dake said that he "took a shine" to one of the women and decided to drive them to Tillamook. Dake got more liquor at Tillamook and they drove out in the country to a farm to see Dakes uncle. After more drinking there they drove on to the ocean beach, stopping at a place called Twin Rocks. They spent a considerable period of time there on the beach and indulging in more drinking. It was after dark, some time after 9:00 o'clock, when the party left the beach, starting for the town of Timber over the Wolf Creek Highway. They traveled a distance of forty miles or so from their last stop when

the accident occurred. One woman was riding in the driver's cab with Dake and the other man and woman were riding in back in the bed of the truck. Wells did not learn of the accident until nearly noon on the following day. Wells considered the truck as stolen. Wells did not see Dake after the accident; Dake had been arrested and as a result of the accident and death of Jasper was sentenced to a year in the state penitentiary. Wells learned of developments by way of a laconic communication received through the mails from Dake shortly after the accident. (Ex. I, T. 63). From this it was apparent that it was going to be claimed that Wells' insurance policy extended coverage to Dake. The matter was reported by Wells to appellant as his insurance carrier, that Dake without consent from Wells had taken the truck on a personal trip to the Coast and became involved in an accident (T.48). Dake in an apparent effort to exculpate himself told different stories regarding the purpose for which he had taken the truck. These contradictions form one of the bases of a motion to the court below to consider the further point of whether Dake should be denied coverage through his failure of cooperation. (T. 46)

The first state court action filed shortly after the accident named both Wells and Dake as defendants

(T. 14). The complaint alleged that Wells was the owner of the truck and that defendants were operating it negligently. Claims by the others in the Jasper car were made directly against the insurance carrier and thus it was that this action for declaratory judgment was filed to the end of having the several controversies settled in one action. Dake was without funds so until the matter could be determined and to prevent a default, appellant defended Dake in the state court action under a reservation of rights agreement and defend Wells therein under the policy here in question. The answer filed in the state court action admitted the negligence of Dake and alleged affirmatively that Dake was not the agent of Wells (T. 66) in driving the truck and **further alleged that he was driving it without either express or implied consent from Wells.** Plaintiff there (Appellee Jasper here) filed a reply denying that Dake was driving the truck without consent of Wells. Also said appellee at that time filed an answer in this declaratory action alleging affirmatively that the question raised of whether Dake was driving the truck with permission of Wells was in issue in the state court action as a disputed fact in said pending action, further alleging that appellant was defending and controlling said state court action by its own attorneys. The state court action

was tried first and resulted in judgment entered by the court in favor of defendant Wells. The court disregarded the jury's verdict on the ground there was no evidence to support it. The state action is referred to here as a question arises whether the judgment there is res adjudicata as the judgment entered by the court was based on the fact that Dake was out on a personal joy ride at the time of the accident.

This action for declaratory judgment was tried by the court without a jury. No opinion was written by the court and thus we are left entirely in the dark as to what process of reasoning lead him to hold that Dake was driving the truck with permission of Wells; the court merely signed a formal findings of fact submitted by appellees, remarkable for being devoid of information. We believe under the rules of civil procedure (rule 52) appellant was entitled to a special finding of fact upon which the conclusion was made that Dake is entitled to protection under the policy, viz: Whether the court felt Wells gave Dake permission to use the truck to go joy riding; or whether he gave Dake permission to use the truck to go hunting and the joy ride was merely a slight deviation; or whether Dake acquired the right to use the truck from Sheldon; or whether there was an implied permission to use the truck growing out of permissive

prior use. These are pertinent questions to be answered in order to be able to place a construction on the meaning of the policy provision "provided the actual use of the automobile is with the permission of the named insured." To conform with the decisions of this court it would be necessary that Dake had permission to use the truck to go joy riding; it is insufficient to make such clause operative in favor of Dake that permission to use was given but for another purpose.

SPECIFICATION OF ERROR I

There is no competent evidence to support the finding that Dake was using the insured truck at the time of the accident with permission of the named insured, so as to constitute Dake an additional insured under the provisions of the policy.

Frederiksen v. Employers' Liability Assur. Corpn., 26 Fed. (2) 76.

Trotter v. Union Indemnity Co., 35 Fed. (2) 104.

ARGUMENT

The testimony shows Dake wanted to borrow Wells' gun to go hunting. Wells had his gun at his home at Jennings Lodge. On Friday afternoon, June 26, 1942, after the logging operations had shut down

for the week end, Wells drove the truck from Glenwood to Jennings Lodge. He took Dake with him, loaned Dake his gun and instructed Dake to drive the pick-up truck back to Gales Creek where it was usually kept over week ends. Wells testified that the truck was to be used by Sheldon, a member of the Wells crew, to go to the site of the logging operations on Sunday morning, June 28th, and fix the yarder whistle which was out of repair and giving trouble. Sheldon's work was that of engineer. Wells also testified that he liked to keep the truck at Gales Creek at that particular season of the year because of fire hazards which might require it to be put into emergency use. Wells testified that Dake had no authority or permission from him to take the truck on Sunday, June 28th for any purpose.

On Sunday morning, June 28th, Dake took the Wells truck which was parked at the Adkins residence at Gales Creek and drove up to the site of the logging operations and went deer hunting. He shot two deer and returned to the Adkins residence with the truck after having left the deer somewhere. Dake went on this hunting trip alone and explained his reason for it by saying that Sheldon did not show up. Dake had no permission from Wells to use the truck to go deer hunting but his testimony was to the ef-

fect that Sheldon had told him that he could use the truck to go deer hunting if he, Sheldon, did not show up. Dake testified (T. 131, 132):

"Q. Now when you left Wells, which was on Friday night two days before this accident, and you left at Oregon City or Jennings Lodge, wherever he lives; is that right?

A. Yes.

Q. You testified he told you to take the truck back to Gales Creek; is that right?

A. Yes.

Q. And did you take it back there?

A. I took it back to Gales Creek.

Q. Yes. Now what is the fact as to whether Sheldon, I think his name is, Corvin Sheldon, was to repair the yarder whistle on Sunday?

A. Well, I don't know whether he was—Mr. Wells give any orders to that effect or not, but then I know that Sheldon said we would fix the whistle when we went up hunting; but Sheldon and me was going to go hunting together, and we always figured on fixing that whistle while we was up there.

Q. Wasn't Sheldon to have the use of that truck that day to go up there to fix that whistle, to start out Sunday morning?

A. I didn't understand it that way.

Q. Hadn't you testified to that effect in your deposition and (78) also on the trial—

A. Well, I say there was two of us and I don't know whether I was supposed to drive it from Gales Creek up there or whether he was supposed to, as far as that goes.

Q. Well, yes; but didn't you testify—

A. As a general rule, yes, he drove because he was a better driver than I was.

Q. Yes; but wasn't it a fact that the truck was up there so Sheldon could take it up to fix that whistle and you were going to go along to ride so you could go hunting?

A. **Yes; and there was another agreement between Sheldon and I, if he was not there I would take it and go anyway.**

Q. That was between you and Sheldon?

A. Yes.

Q. But that wasn't between you and Wells then, was it?

A. Well, I don't know whether Wells knew anything about it or not.

Q. No. Well, your understanding with Wells was that Sheldon was going to take that truck up to fix the whistle and you were going to ride up with him to go hunting, wasn't it?

A. He didn't tell me I couldn't drive it." (Emphasis ours.)

And further on this same point Dake testified, in attempting to show a derivative permission from Sheldon to use the truck, as follows: (T. 133).

"Q. But what I am asking you about now is about Wells' arrangement there. He told you to take the truck back to Gales Creek, didn't he?

A. Yes.

Q. And you took it back?

A. Yes.

Q. Wasn't your understanding with Wells that Sheldon would go up there and fix the whistle and you were going to ride up with him because you wanted to go hunting?

A. My understanding of it was Sheldon and I was going to go hunting and we was going to fix the whistle. There was no—I don't know whether Sheldon was supposed to be paid additional for the job or not. I don't know whether he had any orders to that effect.

Q. You said that it was your understanding with Sheldon a while ago you two were going to go hunting; is that right?

A. Sure.

Q. Did you have that understanding with Wells?

A. I don't know whether I said anything to Wells about it or not."

Wells had no notion of letting Dake use the truck to go hunting or for any other purpose. Wells did understand that Dake probably would ride up to the logging operation with Sheldon and go hunting up there while Sheldon was fixing the yarder whistle.

The hunting trip was over, the deer had been put away somewhere, Dake had an early lunch and about

11:00 o'clock on Sunday morning, June 28th he again started off in the truck, driving west from Gales Creek. He testified in one place that he was on his way back to Round Top Mountain the site of the logging operations, to go hunting again, then he switched this story and said he was going up there to find an old iron camp cot. Dake testifying (T. 123-24):

"Mr. Miller: * * * started off the second time really did you intend to go hunting.

A. What I intended when I left Gales Creek, I intended to go back up on Round Top; that is where I was headed for.

Q. And did you intend to take another road in there; is that the—

A. Well, I was planning on going around—to tell you I never (69) did say just the exact reason for going up there, but I was—I went up there—I knew where there was an iron camp cot and it had been left up there from logging before and it was in good shape and I knew where that was at and I knew it was pretty good; so I intended to go after that and on the way I met these people, started to pass them and I picked them up. I told them I would take them as far as I was going, and at the time I got as far as I was going I got the intention to go on to Tillamook, too; so that is the way I gone to Tillamook.

Q. How far was Tillamook from the point where you intended to turn off?

A. Oh, it must be forty miles, I should judge. I wouldn't say for exact mileage, somewhere in the neighborhood of forty miles."

Regardless of Dake's purpose in starting out on his second trip it developed that he only got about a mile and a half out of Gales Creek when he ran onto a party of hitch-hikers, consisting of two women and one man. He picked these people up and the four of them started off on a joy ride and liquor drinking party which lasted about twelve hours from the time they started at 11:00 o'clock in the morning until 11:00 o'clock at night, the time the accident occurred. In the meantime they had driven something like 135 miles. (T. 144). Dake testified what started him on this trip (T. 126-27):

> "The Court: Tell why you went down here. I read the facts you gave before. You said in your deposition you took a shine to one of the women is why you went on.
>
> A. That is the reason I went on after I picked them up.
>
> The Court: And you did some drinking down there?
>
> A. Yes.
>
> The Court: And you said something in your deposition about a man down there. Did that have anything to do with it?
>
> A. Well, I had a cousin that I figured if he had —he wasn't working, if he had—if he wouldn't go up and go to work. I (72) knew Mr. Wells would take him if he hadn't got work himself. I got down there and he was—he was already working in the shipyards.

The Court: You said a minute ago, having a gun, you thought you might also see something to shoot down there.

A. I had that in mind when I started out.

The Court: I know, but after you started to go to Tillamook you didn't have any use for the gun then.

A. Couldn't take it out after I had seen them along the road there without coming back. I figured if one jumped out in front of the car I would go get him.

The Court: Really you changed your plan and went on down to Tillamook on account of running into these girls; was that it?

A. That is the main reason I went to Tillamook.

The Court: Did you have any further questions?

The Witness: If I hadn't picked them up I wouldn't have went to Tillamook."

The testimony is uncontradicted that Dake had no permission to take the pick-up truck on this joy ride. Dake testified (T. 138).

"Q. Did you have Mr. Wells' permission to drive the pick-up truck over to Tillamook and around to the beach and down to Wolf Creek Highway where this accident occurred?

A. No."

And on the same subject Wells testified (T-71):

"Q. You recall that on June 28th, 1942, your truck was involved in an accident?

A. Yes.

Q. When did you learn of the accident? I believe that it was Sunday.

A. I learned of it about 10:30 Monday morning.

Q. And who did you learn had been driving your truck?

A. Charles M. Dake.

Q. I will ask you to state to the Court whether Charles M. Dake had permission from you to drive that truck?

A. No, he did not.

The Court: Is Dake in the courtroom?

Mr. Powers: Yes.

The Court: Will you point him out to me?

The Witness: Back—(indicating).

Mr. Miller: Back of the room.

Mr. Powers: Q. The actual use that Dake was making of the truck at that time then was without your permission?

A. Absolutely."

There was drinking going on all the time this foursome was out on the joy ride (T. 139 to 143).

In the state court action, it was contended by plaintiff that Dake had driven to Tillamook to look for his "cousin Mike" who might want to work for Wells. This on the theory that it would make Dake an agent of Wells at the time of the accident. Such contention was ruled out by the state court. It was clear to every one that Dake was out on a drinking joy ride with these hitch-hikers, without any permission from Wells to use the truck for that purpose or any other purpose. The court, in commenting upon the drinking party, during the trial below stated: (T. 147-48)

> "The Court: Of course you have a question of causation here, gentlemen. When he got fired up with whatever he was drinking, why, he got some different ideas in his head—I suppose you will argue all that; but I can see the—what is it you call these automobile cases—intervening cause that breaks the chain of causation. So you have the intervening cause of alcohol. As far as his intention was concerned his story is very plain; He was going back to get himself some more meat. But he met the ladies and the gentlemen and he had three drinks, I think he said, and then he got some other ideas. Not an uncommon occurrence. It wasn't his original plan at all; he said so.
>
> Mr. Miller: Q. And the man you were looking for was Mike Louis?
>
> A. That is the fellow I intended to bring over. I knew he wouldn't be a rigging slinger, but I could use him over there as a second loader if he would go out in the woods.

Q. He was your cousin?

A. Yes. That would be if Mr. Wells would hire him after I had found out whether he was there or not."

It is submitted that under the evidence Dake is not entitled to insurance protection under the policy provision here. There is an entire lack of any evidence that Dake had any permission to use the truck at the time of the accident. This case is controlled by two decisions of this court which are considered as leading cases on the subject throughout the country, namely: Frederiksen v. Employers' Liability Assur. Corporation, et al, 26 Fed. (2) 76; and Trotter v. Union Indemnity Co., 35 Fed. (2) 104; opinion of the district court in the same case reported in 33 Fed. (2) 363. The Frederiksen case is particularly in point, with the difference, however, that there was an original permission to use the car in the Frederiksen case which was absent here. This court there held that an omnibus provision would not extend coverage to the driver of a car who had permission from the owner to use the car for a particular purpose, namely, to attend a funeral in Oakland, who, thereafter, went off on a joy ride, and was involved in an accident.

The point being that permission to use the automobile for one purpose did not carry with it implied permission to use it for another purpose so as to bring the user within the provisions of the additional insured clause of the owner's insurance policy. The situation is summed up in the Frederiksen case in the syllabus:

> "Where friend of owner of automobile, having received permission to take it for purpose of going to an early funeral, took additional joy ride in afternoon to town 40 miles away, driver's liability for injuries on return trip were not within owner's liability insurance policy, covering liability of person using or operating car "with the permission of the named assured," in action by person injured to recover from insurer."

And again in Trotter v. Union Indemnity Co., 35 Fed. (2) 104, this court reaffirmed its earlier decision in the Frederiksen case. The Court states, P-106:

> "It might not be unreasonable to say that the owner contemplated that while the enterprise was in progress Hickey and members of his immediate family would now and then use the car for pleasure, but, as suggested by the court below, to hold, in the absence of any affirmative expression of consent, that Grill contemplated or intended that Hickey would permit use by more or less intoxicated joy riders on the streets of Seattle at 4

> o'clock in the morning would be against reason. Nor do we share in the view that express "permission" for a given purpose implies permission for all purposes. See Frederiksen v. Employers, etc. Co. (C.C.A.) 26 Fed. (2d) 76; Denny v. Royal Indemnity Co., 26 Ohio App. 566, 159 N.E. 107; Kazdan v. Stein, 26 Ohio, App. 455, 160 N.E. 506; Id., 118 Ohio St. 217, 160 N.E. 704. Dickinson v. Maryland Sea Co., 101 Conn. 369, 125 A. 866, we do not think it necessarily contra, and if Stovall v. New York Indemnity Co., 157 Tenn. 301, 8 S.W. (2d) 473, is opposed, we are unable to follow it."

In the light of these decisions no matter which view is taken of the lower court's reasoning in finding that Dake was using the truck at the time of the accident with permission of Wells, appellant is entitled to a reversal. There is no evidence here that would square up with any known theory of law which would change the plain import of the additional insured provision of the policy so as to make Dake an additional insured when the evidence shows that he was clearly nothing of the sort, as the "actual use" of the truck was not for any purpose for which he had any conceivable permission, express or implied.

SPECIFICATION OF ERROR II

The Court erred in failing to find for Plaintiff and Enter Declaratory Judgment accordingly.

Cronin v. Travellers Insurance Co. (N. J.) 18 A. (2d) 13.

Card v. Commercial Casualty Co. (Tenn.) 95 S.W. (2d) 1281.

Moschella v. Kilderry, 194 N.E. 728 (Mass.).

Lock v. General Accident Ins., 279 N.W. 55 (Wisc.).

Dickinson v. Great Am. Ind. Co., 6 N.E. (2d) 439 (Mass.).

Hunter v. Western & Surety Indemnity Co., 92 S.W. (2d) 878.

Indemnity Insurance Co. of N.A. v. Sanders, 36 P. (2d) 271 (Okla.).

Indemnity Insurance Co. of N.A. v. Lahman, 36 P. (2d) 274 (Okla.).

ARGUMENT

This specification of error is very nearly the same as the preceding one. What has been said there applies equally well here. There is the further point to be made under this specification, that Dake could acquire no derivative right through Sheldon to use the truck so as to make him an additional insured. It was Dake's testimony that Sheldon told him he might take the

truck to go hunting. Assume that such proposition is correct and overlooking for the moment that Dake had ceased hunting and had gone off on an extended joy ride at the time of the accident, we find the authorities hold that one person who has permission to use a car cannot permit another person to drive it and bring such second person under the omnibus provision of an insurance policy. Here, Sheldon did have the right to use the truck on Sunday morning for the specific purpose of driving up to the site of the logging operations to fix the yarder whistle. There is no evidence that Sheldon had any authority from Wells to let Dake drive the truck. The evidence is to the contrary. Taking Dake's testimony that Sheldon did say he could drive the truck to go hunting, this would create no right under the additional insured clause in favor of Dake. No derivative right can be conferred by one having permission to use another's automobile in favor of a third person, under a policy of insurance such as we have here. This is the holding in Cronin v. Travelers Insurance Company, (N.J.) 18 A. (2d) 13. The following is quoted from syllabus 1 of that case:

> "Where insured named in auto liability policy permitted her son to use automobile, and son, without mother's knowledge, permitted another to take and drive the automobile, the other was not an

'insured' within clause extending coverage in others using automobile with permission of the named insured."

A like situation was considered in Card v. Commercial Casualty Company (Tenn.) 95 S.W. (2d) 1281. The Tennessee Court reached the same conclusion, that no derivitive right can be conferred under a policy of insurance to a driver of the assured's automobile. In order for a driver to bring himself under the additional assured's provision of such policy, he must be driving the car with the permission of the named assured and not with the permission of some person who is using the car with the permission of the named assured. The Court there held that the named assured's discretionary power to select additional assureds can not be delegated. Also see Hunter v. Western and Surety Indemnity Co., 92 S.W. (2d) 878; Moschella v. Kilderry, 194 N. E. 728 (Mass.).

Locke v. General Accident Ins. 279 N.W. 55 (Wisc.).

Dickinson v. Great Am. Ind. Co., 6 N. E. (2) 439 (Mass.).

Another way of stating the proposition is that permission to drive does not confer upon licensee the power to confer permission and one driving under such derivitive permission is not an additonal assured. This is the holding of the Supreme Court of Oklahoma in the cases of Indemnity Insurance Co. of N. A. v. Sanders, 36 P. (2d) 271, and Indemnity Insurance Company of N. A. v. Lahman, 36 P. (2d) 274. In syllabus 3 of the Sanders case it is stated:

> "Where insured gave son-in-law permission to drive automobile on business trip to certain town, son-in-law could not extend such permission to include another's driving of automobile in different city on following day; therefore driver was not 'additional assured' within protection of automobile liability policy."

The foregoing decisions are in line with this court's holding in Trotter v. Union Indemnity Co. supra, in which it held that Hickey, who had the right to use Grill's automobile, had no right to turn it over to Bullock to use so as to make Bullock an additional insured under the owner's policy of insurance.

SPECIFICATION OF ERROR III

There is no competent substantial evidence to support the finding that the "actual use" of the truck by Dake at the time of the accident was with permission of the named insured.

Lehl v. Hull, 152 Ore. 470; 53 Pac. (2d) 48, 54 Pac. (2d) 290.

Kazden v. Stein, 160 N.E. 704 (Ohio).

ARGUMENT

Dake stated that Wells did not tell him he could not drive the truck. Passing for the moment the evidence which shows that the members of Wells' crew well knew that no one could take the truck without Wells' permission and that Wells had never let anyone use the truck for pleasure trips, this statement of Dake respecting no specific direction from Wells not to use the truck, would not make him an additional insured under the policy. It takes more than a negative act—permission cannot be presumed. This is the holding in Lehl v. Hull, 152 Ore. 470; 53 Pac. (2nd) 48, 54 Pac. (2nd) 290. In which case the adult son of the owner of the car attempted to telephone his father in order to get permission to use the car. He was un-

able to talk with his father and took the car without express permission, although he had used the car on previous occasions. It was sought to hold the father liable under the family purpose doctrine. The court refused to infer any permission because of prior use of the automobile by the son. The court, on rehearing, in adhering to its opinion, said: (P. 482)

> "When it is remembered that the mission of the son was to take a young man and two young ladies to the golf links for an evening's entertainment and that the son's effort to contact his father in order to secure the father's permission to so use the car was fruitless, the conclusion is inescapable that the father had no interest whatever in the son's enterprise upon that evening."

And further: (P. 484)

> "The sixth ground implies that the use of the car by the son on former occasions constitutes a basis for inferring either that the mission of the son on the evening of the accident was not as he said it was, or that some interest of the father was conserved in carrying out such an enterprise. Not even conjecture or speculation could devine any purpose or errand beneficial to or in the interest of the father in respect to such an enterprise; and there is not a suggestion in the records that the son went anywhere or did anything with the automobile on that occasion other than as he testified."

That decision stands for the further point that it is not enough that a person who takes the car believes

the owner would permit him to use it if he asked for its use. Thus it can be seen that the fact Dake said Wells did not forbid him to use the truck cannot be spelled into a permission to use it, especially for the purpose of going joy riding with drinking companions at a time when the country is at war and there is a shortage of tires and priorities required that the truck be used in logging operations. There is no showing of any use of this truck by Dake or anyone else for similar purposes. The permission required in order to make the provision of the policy operative as to Dake is permission from the owner for the particular use being made of the truck at the time of the accident and there is no way from the evidence here that any such permission could possibly be spelled out. A person cannot delegate to himself permission to use another's vehicle and make the clause operative. The court in Kazden v. Stein, et al, 160 N.E. 704 (Ohio) in considering the question of implied consent of the driver to use a car, points out the necessity of mutuality and held that implied consent could not exist without the element of mutuality and points out there must be some action on the part of him who must consent. In other words it is insufficient for the driver of a car to say that he understood that he might use it. The proof must show mutuality and

must show that the owner did something which would constitute consent or permission to use the car. There could be no legal implication or any significance from the mere fact that a driver thought that he might use the car. It requires mutuality. It is just as necessary to show mutuality respecting implied consent as it is to show mutuality in express consent.

SPECIFICATION OF ERROR IV

The court erred in its finding and conclusion of law that the same issue was not adjudicated in the state court action as to Appellee Edward J. Jasper administrator of the estate of Emmett C. Jasper, deceased.

Associated Oil Co. v. Edgerton, 158 Ore. 607; 77 Pac. (2) 416;

Butler v. Maas, 163 Ore. 201; 94 Pac. (2) 1116;

Hall v. Zeller Brothers, 17 Ore. 381; 21 P. 192;

Bunnell v. Parelius, 160 Ore. 673; 87 P. (2d) 230;

Bunnell v. Parelius, 166 Ore. 174; 111 P. (2d) 88;

Lehl v. Hull, 152 Ore. 470; 53 P. (2d) 48, 54 P. (2d) 290;

Millar v. Semler, 137 Or. 610; 2 P. (2d) 233, 3 P. (2d) 987;

Miller v. Service and Sales, Inc., 149 Ore. 11; 38 P. (2d) 995;

Allum v. Ball, 168 Ore. 577; 124 P. (2d) 533.

ARGUMENT

One issue under the pleadings in the state court was whether Dake had taken this truck without the consent of Wells and was using it on a personal mission of his own at the time of the accident. This allegation is made in the defendant's answer in the state court action and denied by plaintiff therein. It is the law of the State of Oregon that when a person is involved in an accident while operating a motor vehicle owned by another that an inference arises that the driver is the agent of the owner and acting within the scope of his employment. In order to overcome this inference if in fact the driver is not an agent the owner is required to go forward with the evidence and show the true facts and if the facts shown are uncontradicted, that the driver was not about the business of the owner, then the inference is dispelled and the court can declare as a matter of law that the owner is not liable for the negligent operation of the car by such driver. It is essential under the Oregon decisions that the owner produce testimony disclosing the full facts under which the driver was using his car at the time of the accident in order to be entitled to the above rule.

Bunnell v. Parelius, 160 Ore. 673; 87 P. (2d) 230.

Bunnell v. Parelius, 166 Ore. 174; 111 P. (2d) 88.

Lehl v. Hull, 152 Ore. 470; 53 P. (2d) 48, 54 P. (2d) 290.

Millar v. Semler, 137 Ore. 610; 2 P. (2d) 233, 3P. (2d) 987.

Miller v. Service and Sales, Inc. 149 Ore. 11; 38 P. (2d) 995.

Allum v. Ball, 168 Ore. 577; 124 P. (2d) 533.

Thus it was in the state court action that Wells alleged affirmatively that Dake had no right to use the truck, that he had given him no consent to use it but that Dake had taken it and was on a personal mission of his own at the time of the accident. Testimony was developed on this point during the trial in the state court action (T. 170, 171, 172). Wills testifying.

"Q. Going back to the car, you say that he didn't have your permission or authority, express or implied in any way, shape or form, to use that car on the day of the accident?

A. No.

Q. And it was to be used solely by Mr. Corwin, trip on his own private business.

A. Yes, except that he was to go up with him on a hunting.

Q. And Corwin was—or Sheldon was to drive the car?

A. Yes.

Q. Had Mr. Dake ever taken your car or used it without your permission and knowledge, express or implied, before this time, on the 28th of June?

A. No, not that I know of.

Q. Did he have any right to use the car on Sunday, the 28th, referring to Dake?

A. No.

* * * * (Cross Examination)

Q. Mr. Wells, you were here this morning when Mr. Norblad made his opening statement, were you not?

A. Yes.

Q. Did you hear him say that Dake, Charles Dake, practically stole the pick-up, that would be the evidence in this case?

A. I didn't hear him say that.

Q. You heard that statement?

A. Yes.

Q. Do you want to go on record as subscribing to that same statement made by your attorney, that Charles M. Dake stole this pick-up?

A. I think so.

Q. At the time of the accident?

A. Yes."

It was on this testimony that the state court entered judgment in favor of Wells. Appellee Jaspers' attorney here, working on this question of consent or

permission in the state court action, made a request to the court to have the jury make a special finding on this very question and the jury answered in the negative. (T. 182):

> "2. Or, was defendant Dake at the time of the collision driving said pick-up delivery truck either with the express or with the implied permission or consent of defendant Wells on defendant Dake's own business? No.
>
> 3. Or, was defendant Dake at the time of the collision driving said pick-up delivery truck entirely without the permission or consent of defendant Wells and entirely on defendant Dake's own business? No."

A comparison of the record in this action with the transcript in the state court action, plaintiff's exhibit 12 here, will show that the same issue was litigated in both actions. The state court action was tried first and the court there based its judgment upon the established facts there one of which is that Dake had no permission to use the truck. This factual issue became res adjudica and should have been declared such by the court below. The parties are considered the same. The appellant insurance company was not a nominal party to the state court action but it had

charge of the defense and the authorities under such a situation recognize the rule that the parties are to be considered the same. Cases holding that the insurance company is entitled to show that the matter is res adjudicata where it conducted the defense of a prior case in the name of an insured, are set forth in the annotation 123 ALR 708.

The matter of consent or permission was litigated in the state court action and by the judgment there the fact became established that Dake had no consent to use the truck and that issue is now res adjudicata. Associated Oil Co. v. Edgerton, et al, 158 Ore. 607, (77 P. (2d) 416) syllabus 6:

> "A judgment or decree on the merits is a bar to subsequent action or suit between same parties on same claim as to every matter that was, or might have been, litigated."

Butler v. Maas, 163 Ore. 201; 94 P. (2d) 1116; syllabus 4:

> "The potency of a judgment as an estoppel concludes every fact necessary to uphold it, and extends, not only to matters actually determined but to every other matter which the parties might have litigated and have had decided as incident to and essentially connected with subject matter of litigation, and every matter coming within the legitimate purview of original action, both in

respect to matters of claim and defense, and a default judgment or one confessed, is attended with the same legal consequences."

Hall v. Zeller Brothers, 17 Ore. 381 (21 P. 192); syllabus:

"Former adjudication—Estoppel—Where a fact has been once litigated in a court of competent jurisdiction, the judgment rendered therein forever estops the parties and their privies from again litigating the same fact.

Verdict—In an action where there are numerous issues and a general verdict, it must be intended that the verdict is as comprehensive as the issues, and concludes every question of fact at issue.

Its effect—Where some specific fact or question has been adjudicated or determined in a former suit, and the same fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit, if properly presented and relied on, will be held conclusive upon the parties in the latter suit, without regard to whether the cause of action is the same in both suits or not."

CONCLUSION

It is respectfully submitted the lower court erred with respect to each specification of error raised on this appeal and judgment should be reversed and a judgment entered in favor of appellant declaring that Dake's use of the truck was without permission and that he is not entitled to protection under appellant's insurance policy as an additional insured.

Respectfully submitted,

JAMES ARTHUR POWERS

Attorney for Appellant.